UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2014 MSPB 4

Docket No. CH-0752-13-0435-I-1

Robert Kavaliauskas,

Appellant,

v.

Department of the Treasury,

Agency.

January 16, 2014

Rebecca A. Solomon, Esquire, Albany, New York, for the appellant.

Diana R. Stallard, Esquire, Dallas, Texas, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 This matter is before the Board based on the administrative judge's November 7, 2013 order certifying an interlocutory appeal of her determination that the appellant was collaterally and judicially estopped from challenging the charge that formed the basis of his removal from employment. For the reasons set forth below, we REVERSE the administrative judge's ruling, VACATE the order that stayed the processing of the appeal, and RETURN this case to the Central Regional Office for further adjudication consistent with this decision.

BACKGROUND

¶2 The appellant was an internal revenue agent, GS 11. Initial Appeal File (IAF), Tab 3, Subtab 4a. In March 2013, the agency removed the appellant for improperly accessing taxpayer data without official reason to do so. *Id.*, Subtabs 4a, 4b, 4i.

¶3 In October 2011, prior to his removal, the appellant entered into an agreement with the United States Attorney's Office for the Eastern District of Missouri for pretrial diversion of the potential charge of unauthorized use of a government computer in violation of 18 U.S.C. § 1030(a)(2)(B). *Id.*, Subtab 4s, Subtab 4u at 47; IAF, Tab 11 at 1-2. The facts that led to the agreement are not explained in the agreement itself. IAF, Tab 3, Subtab 4s. However, the agency asserted that the charge that led to the agreement is the same as that which gave rise to the appellant's removal, and the appellant did not challenge this assertion. IAF, Tab 11 at 3-4; IAF, Tab 12 at 4-5; *see* IAF, Tab 3, Subtab 4u (containing a report of investigation into the appellant's unauthorized access by the Treasury Inspector General for Tax Administration, including information reflecting a referral to the United States Attorney's Office for criminal prosecution). Under the agreement, the appellant "accept[ed] responsibility for [his] behavior." IAF, Tab 3, Subtab 4s at 1. Prosecution of the appellant's offense was deferred for 18 months, provided the appellant complied with the terms of the agreement. *Id.* The agreement further provided that the agreement "may also be used for impeachment purposes in connection with any prosecution of the above-described offense." *Id.* at 1-2. The appellant was released from the pretrial diversion program in December 2012, 5 months early. IAF, Tab 11, Exhibit A. He was never prosecuted for any crime in connection with the charged conduct. *See* IAF, Tab 11 at 3-4 (noting that the pretrial diversion agreement enabled the appellant to avoid a conviction); IAF, Tab 12 at 4 (noting that, per the pretrial diversion agreement, the appellant was not criminally prosecuted).

¶4 On November 7, 2013, the administrative judge found that the appellant was prohibited from challenging the occurrence of the misconduct underlying his removal because of his entry into the pretrial diversion program. IAF, Tab 16. The administrative judge certified her ruling for interlocutory appeal on her own motion pursuant to 5 C.F.R. § 1201.91. IAF, Tabs 15, 17. The parties did not oppose certification. IAF, Tab 15. We find that the issues of the application of collateral and judicial estoppel to the pretrial diversion agreement meet the criteria for certification of interlocutory appeal. 5 C.F.R. § 1201.92.

ANALYSIS

The appellant is not barred by collateral estoppel from litigating the facts underlying his pretrial diversion agreement.

¶5 The appellant's entry into the pretrial diversion program does not collaterally estop him from challenging the facts underlying his removal because he did not plead guilty and he was not convicted. The purpose of collateral estoppel is to "relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (citation omitted). For collateral estoppel to apply, four prerequisites must be met: (1) The issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against whom issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party to the earlier action or as one whose interests were otherwise fully represented in that action. *Gossage v. Department of Labor*, 118 M.S.P.R. 455, ¶ 13 (2012).

¶6 The "actually litigated" element is satisfied when the issue was properly raised by the pleadings, was submitted for determination, and was determined. *Id.* A conviction based on a guilty plea meets this requirement. *Raymond v.*

Department of the Army, 34 M.S.P.R. 476, 480-81 (1987); *Loveland v. U.S. Air Force*, 34 M.S.P.R. 484, 490-91 (1987). However, a guilty plea alone, without a conviction, does not. *See Faucher v. Department of the Air Force*, 96 M.S.P.R. 203, ¶ 6 (2004) (finding that collateral estoppel did not apply where the defendant entered a guilty plea and his conviction was continued without a finding by the court). This is because an admission of guilt is not required for a guilty plea, which requires only that the defendant consent that judgment be entered against him. *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970).

¶7 The appellant did not enter a guilty plea, but rather accepted responsibility for his behavior in the pretrial diversion agreement. IAF, Tab 3, Subtab 4s at 1. We do not agree with the administrative judge's conclusion that signing the pretrial diversion agreement was the same as entering a guilty plea for purposes of determining whether the underlying conduct was actually litigated. IAF, Tab 16 at 2. The agreement provided that "any indictment or information" against the appellant would be "discharged" if he complied with the requirements of the pretrial diversion program. IAF, Tab 3, Subtab 4s at 1. The use of the agreement for "impeachment purposes" was limited to any future prosecution. *Id.* at 1-2. Thus, neither party intended for the appellant's admission of responsibility to be an admission of guilt with consent that judgment be entered against him. Further, there was no conviction, and, in fact, the appellant was successfully discharged from the program.[1] IAF, Tab 11 at 3-4, Exhibit A; IAF, Tab 12 at 4.

¶8 In reaching the conclusion that collateral estoppel barred the appellant from disputing the misconduct at issue in the instant appeal, the administrative judge cited *Swanson v. Fields*, 814 F. Supp. 1007, 1013-16 (D. Kan.), *aff'd*, 13 F.3d

[1] Further, the notion that the agreement should preclude the appellant from challenging his removal is undercut by the fact that the agreement specifically contemplated the appellant's continued employment with the agency, requiring that he "attend any training or perform any service or disclosure deemed appropriate by [his] supervisors with the [agency]." IAF, Tab 3, Subtab 4s at 3.

407 (10th Cir. 1993) (Table), for the principle that criminal defendants who enter into diversion agreements are collaterally estopped from subsequently suing for civil rights violations arising out of their arrests.[2] IAF, Tab 16 at 3. However, the decision in *Swanson* rested on a prior dismissal of pending criminal charges pursuant to a diversion agreement. *Swanson*, 814 F. Supp. at 1014 ("Diversion results in a final judgment to the extent that the criminal charges are dismissed on the agreement of the parties."). In contrast, in the instant case, there is no evidence that charges were pending or that a court dismissed them. *See* IAF, Tab 11 at 4 (noting, in the agency's brief, that the appellant was not prosecuted). The agreement is not signed by a judge and does not reference a court docket number. IAF, Tab 3, Subtab 4s. Instead, it is signed by the appellant, a representative from the United States Attorney's Office, and an officer of the court's pretrial services division. *Id.* at 3; *see* IAF, Tab 11, Exhibit A (reflecting that pretrial services is associated with the court). Therefore, because the "actually litigated" element of the test for collateral estoppel has not been met, the appellant is not precluded from denying that he improperly accessed taxpayer data without official reason to do so.

The appellant is likewise not barred by judicial estoppel from litigating the facts underlying his pretrial diversion agreement.

¶9 Judicial estoppel preserves the integrity of the judicial process by precluding a party from contradicting a tribunal's determination in another proceeding when the determination was based on the position taken by the party in that case. *Tompkins v. Department of the Navy*, 80 M.S.P.R. 529, ¶ 8 (1999)

---

[2] The administrative judge also cited to *Roesch v. Otarola*, 980 F.2d 850 (2d Cir. 1992), for her conclusion that the pretrial diversion agreement has a preclusive effect on the instant litigation. IAF, Tab 16 at 3. However, the court in *Roesch* concluded that entry into a criminal diversion program was not a termination of litigation in the criminal defendant's favor, a necessary element of a claim of malicious prosecution or false imprisonment brought pursuant to 42 U.S.C. § 1983. 980 F.2d at 852-854. The court did not examine the issue of collateral estoppel.

(holding further that application of the doctrine of judicial estoppel to administrative adjudications is appropriate). While there is no single test for determining if judicial estoppel applies to a proceeding, "several factors typically inform the decision whether to apply the doctrine in a particular case": (1) a later position must be clearly inconsistent with the same party's prior position; (2) the party was successful in the earlier proceeding in persuading the court of its position, such that "judicial acceptance of an inconsistent position in a later proceeding would create 'the perception that either the first or the second court was misled'"; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (citations omitted).

¶10 Where a prior action was settled, judicial estoppel does not bar parties from later taking inconsistent positions to those asserted in the prior action. *Water Technologies Corp. v. Calco, Ltd.*, 850 F.2d 660, 665-66 (Fed. Cir. 1988) (citations omitted). The purpose of judicial estoppel, to preserve the integrity of the courts, is not implicated when the action ends in settlement without a disposition by the court because there is no judicial acceptance of the party's prior position. *Id.* at 666.

¶11 The pretrial diversion agreement is akin to a settlement, and therefore judicial estoppel does not apply. As discussed above, it does not appear that the criminal case was ever docketed, and the agreement was not signed by a judge. IAF, Tab 3, Subtab 4s. There is no evidence that a court accepted either party's position. *Id.* Thus, the agreement does not reflect that either party "won" the matter, but rather that the interests of both parties (not just the appellant's interests) were served by the agreement. *Id.* at 1. Under these circumstances, we decline to give the pretrial agreement preclusive effect.

ORDER

¶12 For the reasons set forth above, we reverse the administrative judge's ruling that the pretrial diversion agreement estops the appellant from challenging the conduct that underlies his removal. We RETURN this case to the Central Regional Office for further adjudication consistent with this Opinion and Order.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.